Supreme Court, U.S.
FILED

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No. 94-___ 931573 APR 4 1994

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

OFFICE OF THE CLERK

RONALD E. CHAMNESS AND RHEA ANN CHAMNESS,

Petitioners,

V.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK DALLAS, N.A., DEPOSIT INSURANCE BRIDGE BANK, N.A., OREGON, INC., WILLIAM R. TRIONE, AND ALINDA HILL WIKERT,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit And Request For Summary Reversal

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May a trial court or Court of Appeals grant or affirm a motion for summary judgment *sua sponte*, or on grounds not plead in the motion? If so, under what circumstances?

LIST OF ALL PARTIES TO THE PROCEEDINGS

Ronald E. Chamness

Rhea Ann Chamness

William R. Trione

Alinda Hill Wikert ("Wikert")

Deposit Insurance Bridge Bank, N.A.

Oregon, Inc.

Bank One, N.A.

Federal Deposit Insurance Corporation ("FDIC")

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS BY OTHER COURTS

Case Below:

Chamness v. Federal Deposit Insurance Corp., No. 93-1486, (5th Cir. Nov. 17, 1993), (reh'g. denied Jan. 4, 1994). [Unpublished] *Chamness v. Federal Deposit Insurance Corp.*, No. 3:CV-89-1117-P, (N.D. Tex. April 29, 1993) [Unpublished]

STATEMENT OF THE GROUNDS UPON WHICH JURISDICTION OF THE SUPREME COURT IS BASED

Judgment of the Court of Appeals below was enter November 17, 1993.

Appellants timely filed a Petition for Rehearing by the Court of Appeals on November 30, 1993. Appellants Petition for Rehearing was denied on January 4, 1994. Petition for Certiorari is sought within ninety (90) days of entry of a mandate denying a Petition for Rehearing by a Court of Appeals giving jurisdiction under 28 U.S.C. § 1254(2) and Supreme Court Rule 13.4.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

United States Constitution Amendment V

"[No person shall]... be deprived of life, liberty, or property, without due process of law."

Federal Rule of Civil Procedure 56(b)

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

Federal Rule of Civil Procedure 56(c)

> The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE FACTS OF THE CASE

Ronald E. Chamness and Rhea Ann Chamness ("Chamness") claimed in the trial court that certain liens granted to a bank were invalid, because the liens purported to encumber the Chamness' homestead, which is illegal in the State of Texas. The bank failed. The FDIC, in its capacity as receiver for the failed bank, filed a Motion for Summary Judgment based upon the doctrine of *D'Oench-Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) and 12 U.S.C. § 1823(e). A co-defendant, who purchased the property at the foreclosure of the liens, did not file a Motion for Summary Judgment. The Court of Appeals did not reach the question of whether the Motion for Summary Judgment was properly granted on the grounds found by the District Court, i.e. *D'Oench-Duhme*, 12 U.S.C. § 1823(e) and sanctions under Fed. R. Civ. P. 16. The Court of Appeals ruled instead, that the Motion for Summary Judgment should be granted on an entirely new and unplead legal theory of estoppel to claim homestead. In addition, the Court of Appeals affirmed the grant of summary judgment in favor of the co-party who did NOT FILE a motion for summary judgment.

BASIS OF JURISDICTION IN THE COURT OF APPEALS

Petitioners presented a Final Order of the District Court to the Court of Appeals, giving the Court of Appeals jurisdiction under 28 U.S.C. § 158(d).

REASONS FOR GRANTING WRIT OF CERTIORARI

A. LACK OF UNIFORMITY IN CIRCUIT COURTS.

THE COURTS OF APPEAL HAVE ESTABLISHED UNCERTAIN AND INCONSISTENT STANDARDS FOR THE AFFIRMANCE OF SUMMARY JUDGMENT ON GROUNDS DIFFERENT FROM THOSE RELIED UPON AND PLEAD BY THE PARTY MOVING FOR SUMMARY JUDGMENT.

There are various and conflicting standard enunciated by the various Courts of Appeal regarding the standards for affirming a summary judgment on grounds different from those relied upon by the movant. Wikert, in her Response to Appellants' Petition for Rehearing, cited cases from each Circuit Court of Appeals in support of the general proposition that the Court may affirm a grant of summary judgment on grounds other than those stated by the District Court. The cases and the standard enunciated in each case are as follows:

1. *Chamberlain v 101 Realty*, 915 F.2d 777, 783 n.8 (1st Cir. 1990)

   We are, of course, free to affirm a district court's decision "on any ground supported by the record even if the issue is not pleaded, tried or otherwise referred to in the proceedings below." *Citing Norris v. Lumbermen's Mutual Casualty Co.*, 881 F.2d 1144, 1151-52 (1st Cir. 1989).

2. *Alferro Motor Company, Inc. v. Ward*, 814 F.2d 883, 887 (2d Cir. 1987)

Although the District Court based its dismissal of the complaint on other grounds, we are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon the district court.

3. *Johnson v. Orr*, 776 F.2d 75, 83 n.7 (3rd Cir. 1985).

An Appellate Court may affirm a result reached by the district court on reasons that differ so long as the record supports the judgment.

4. *Keith v. Aldridge*, 900 F.2d 737, 739 (4th Cir. 1990)

In doing so, we apply the summary judgment principals applicable in the district court, but are not bound to particular theories relied upon by that court.

5. *Barnhart v. Richardson Merrill*, 892 F.2d 440,444 (5th Cir. 1990).

We may affirm a grant of summary judgment on grounds other than those stated by the trial court.

6. *Hooks v. Hooks*, 771 F.2d 935, 945 (6th Circuit 1985).

However, this Court may examine the record and affirm the District Court on other grounds if we determine their is no material controversy regarding matters of fact or law.

7. *Sally Beauty Company v. Nexus Products Company, Inc.*, 801 F.2d 1001, 1005 (7th Cir. 1986).

We may affirm this summary judgment, however, on a different ground if it finds support in the record.

8. *Lane v. Peterson*, 899 F.2d 737, 743 (8th Circuit 1990).

We may affirm a judgment on any grounds support ed by the record, even if not relied on by the District Court.

9. *Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco*, 792 F.2d 1432, 1437 (9th Cir. 1986).

> We may affirm the district court on a ground not selected by the district court judge, so long as the record fairly supports such an alternative disposition of the issue.

10. *Bath v. National Association of Intercollegiate Athletes*, 843 F.2d 1315, 1317 (10th Cir. 1986).

> While it is true that we can affirm on any grounds that find support in the record..., even where the lower court reach its conclusions from a different or even erroneous course of reasoning...we decline to do so under the facts of this case. Had the district court intended to review count V on its merits, we might also be inclined to determine the validity of the cause of action under the prevailing law. The district court expressly avoided any such dertermination, however, and we do not believe that under these facts, the substance of plaintiff's claim should be examined for the first time on appeal. Moreover, we do not have a complete record on the existence of diversity jurisdiction.

11. *Estate of Whitt v. C.I.R.*, 751 F.2d 1548, 1558 (11th Cir. 1985).

> Where, the factual findings permit us to affirm on an alternative ground, we may do so, at least in the absence of prejudice.

These enunciations of a general standard stand in marked contrast to the more specific discussion and criticism of the practice in other Courts of Appeal decisions. The split of authority and lack of clarity between the circuits is illustrated by the 5th Circuit Court of Appeals in *Federal Deposit Insurance Company v. Laguarta*, 939 F.2d 1231, 1241 n.20 (5th Cir. 1991), cited below by the FDIC.

> At least three circuits have indicated that a summary judgment generally should not be affirmed on grounds that were neither raised nor relied on below.

The Court of Appeals in *Laguarta*, in footnote 20 refers to the following three cases which conflict with the general discussion contained in the cases cited by Wikert.

> To be sure, appellate courts must tread cautiously over terrain that the parties have failed to explore on appeal. Any issue injected into the appeal by the court itself must have been adequately presented below, and the parties must have had a full opportunity to develop the relevant facts. *Heirs of Fruge v Blood Services* 506 F.2d 841, 844 n.2 (5th Cir. 1975). In addition, the Appellate Court should have the benefit of thorough briefing before considering a decisive issue or rational.

Arlinghaus v. Rittenhour, 622 F.2d 629, 638 (2d Cir. 1980).

The 4th Circuit Court of Appeals clarified that although they are not bound to consider only those specific grounds upon which the district court based its summary judgment, the alternative ground must have been raised at the District Court:

> At least any alternative grounds that have been presented both to the district court and on appeal so that the nonmoving party has had fair opportunity to contest at both levels, thereby, avoiding the vexed problem of raising new issues or theories on appeal. See 10 *Wright and Miller* supra § 2716 at 345 through 346.

Charvonnages DeFrance v. Smith, 592 F.2d 406, 416 n.9 (4th Cir. 1978).

In a parallel situation, the District of Columbia Circuit has made the following ruling in evaluating whether an Appellate Court can consider new issues regarding a 12(B)6 Motion which has been considered by a district court as a motion for summary judgment:

> Unless the new issue uncovered by the appellate court was one which was clearly framed by the proceedings below so that the parties had a legitimate chance to submit all relevant materials and argue their implications, it is clearly unjust for the appellate court to direct the issuance of summary judgment on a new issue raised sua sponte on appeal.

Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1537 (D.C. Cir. 1984)

> When the parties have not even been notified that an issue will be considered by the court at the only point when they may submit factual affidavits—the trial level - then there is every likelihood that they have been denied the full opportunity to present the applicable facts.

Ramirez de Arellano v. Weinberger, at 1537.

What is astounding about the facts before this Court is that the new, unplead and independent legal theory relied upon by the Fifth Circuit Court of Appeals in affirming summary judgment in favor of the FDIC, also affirms summary judgment in favor of Wikert, who had not even filed a motion for summary judgment.

There is no consistency among the circuit courts of appeals, nor is there consistency within the circuits themselves, concerning when a Court may *sua sponte* grant summary judgment, or affirm on grounds not raised in the motion. This Court ruled in 1949 that it was improper for a court of appeals to grant summary judgment in the absence of fair opportunity for a non-movant to set forth grounds for denying the motion for summary judgment. *Fountain v.*

Filson, 337 U.S. 921, 69 S.Ct. 1153 (1949).[1]

It is essential for the purposes of judicial economy, and for preservation of the due process rights of the litigants, for this Court to enunciate a consistent standard under which a court may grant, or affirm, a motion for summary judgment on grounds other than those stated in the motion, and to clarify under what circumstances a court may render summary judgment *sua sponte*. In the absence of such a definitive rule, unnecessary time and resources will be spent by non-movants in summary judgment proceedings to refute factual theories which are not germane to the grounds contained in a motion for summary judgment. Alternatively, non-movants will be forced to dispute legal theories which are not germane to the grounds raised in the motion for summary judgment. Litigants are entitled to know whether they must raise fact issues with regard to every conceivable legal theory which is arguable, based on a summary judgment record.

The practical nature of the dilemma presented by this legal issue is illustrated by the following:

In the case at bar, the facts necessary to invoke the legal defenses of *D'Oench-Duhme* and 12 U.S.C. § 1823(e) to Chamness homestead claim were simple:

1. a representation was made, and; (Fact 1)
2. the bank to whom it was made failed (Fact 2).

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[1] In *Stiles v. RTC*, 867 S.W.2d 24 (Tex. 1993), the Texas Supreme Court addressed the problem and prohibited the practice of affirming summary judgment on grounds not plead at the trial court level.

The legal premise of the Motion was that given Fact 1 and Fact 2, a borrower could not assert a claim or defense inconsistent with the representation established by Fact 1. Since Facts 1 and 2 were not disputed, no controverting affidavits were filed by the non-movant petitions.

The Court of Appeals, however, affirmed the Summary Judgment on the new and unplead theory of estoppel to claim homestead. The theory of estoppel to claim homestead requires the establishment of Fact 1, but is further predicated on several facts not established in this case:

Non-established Fact 1:	that the Petitioner was not in possession of the claimed homestead;
Non-established Fact 2:	that the Bank believed and relied on the representation of the homestead claimant; and
Non-established Fact 3:	that the Petitioner was in possession of another property.

Had the Non-Movant Petitioners known that every legal theory in the universe of potential and unplead legal theories needed to be refuted, they could, and indeed would have refuted non-established facts 1, 2 and 3. Petitioners did not and could not, and attempting to do so would be to attempt a fool's errand.

Litigants are entitled to know the legal theories of their opponents. A party resisting summary judgment should not be required to anticipate and/or rebut each and every imaginable legal theory that a trial Court or Court of Appeals believes is applicable to a summary judgment record.

The Respondents will no doubt continue their argument that it is well settled that the Court of Appeals may affirm a District Court's Judgment on any plead or unplead legal ground. This argument ignores the following problems, however, such a practice poses by denying notice and due process to the non-movant.

There is no authority for a Court of Appeals to affirm summary judgment in favor of a party not moving for summary judgment on grounds not presented or argued by the party moving for summary judgment. This unorthodox procedure is a violation of the Petitioners rights under the Fifth Amendment of the United States Constitution.

The holdings relied on by Respondents are inconsistent and do not enunciate, articulate, or reasonably guide practitioners as to when and under what circumstances courts of appeals may affirm summary judgment on grounds not raised or argued before the trial court.

Petitioners pray the Court grant this Petition and after hearing, reaffirm and expand the sound logic in *Fountain v. Filson*, and require the Courts of Appeal and Trial Courts abandon the practice of entertaining non-existent or imaginary motions.

B. DENIAL OF DUE PROCESS

IT IS A DENIAL OF DUE PROCESS FOR THE COURTS OF APPEAL TO AFFIRM SUMMARY JUDGMENTS IN FAVOR OF A NON-MOVING PARTY ON GROUNDS DIFFERENT FROM THOSE PLEAD OR RAISED BY A MOVING CO-PARTY, BECAUSE THE PRACTICE DEPRIVES THE ADVERSELY AFFECTED PARTY OF AN OPPORTUNITY TO PRESENT SUMMARY JUDGMENT EVIDENCE ON THOSE ISSUES.

The Federal Rules of Civil Procedure do not discuss the criteria for courts to apply in granting a motion for summary judgment *sua sponte* or on grounds different from those stated in the movant's pleadings. These criteria have, apparently, been developed by the various courts of appeal as outlined above. The deprivation of the opportunity to present opposing summary judgment evidence in response to specific legal theories results in a de facto denial of procedural due process.

> Procedural due process imposes restraints on governmental decisions which deprive individuals of liberty or property within the meaning of the due process clause of the 5th or 14th Amendment.

Mathews v. Eldridge, 424 U.S. 319 (1975) (Brennen, J. Marshall, J., dissenting)

> The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.

Mathews v. Eldridge, at 902.

To render judgment that a plaintiff take nothing based upon a legal theory not raised by the pleadings of the moving party, and in addition, to render judgment in favor of a co-

party who did not move for a summary judgment at all, clearly deprives the plaintiff of meaningful opportunity to be heard.

The unfair nature of this lack of procedural due process invites abuse. A movant in a summary judgment motion could purposefully avoid mention of a legal theory which is supported by facts it knows can be disputed, with the hope that a law clerk, district judge, or appellate court would raise, *sua sponte*, this legal argument never considered by the party resisting summary judgment and, therefore, not rebutted. Once the case is on appeal, the movant simply springs the trap and argues a new legal theory for the first time on the authorities cited herein, or even on the basis of harmless error. Since the fact controverting stage in the litigation has passed, the summary judgment opponent's fate is sealed.

Prayer

WHEREFORE, PREMISES CONSIDERED, Petitioners pray the Court grant the Writ of Certiorari and, upon review of the decision below, summarily reverse the judgment of the United States Court of Appeals for the Fifth Circuit and direct that Court to remand the case to the United States District Court for a trial.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

APPENDIX

A. Opinion of Fifth Circuit Court of Appeals

B. Order of Court of Appeals Denying Petition for Rehearing and Suggestion for Rehearing *En Banc*

C. Motion for Partial Summary Judgment

D. District Court Memorandum Opinion and Order

E. District Court Judgment

App. A

IN THE UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 93-1486
Summary Calendar

RONALD E. CHAMNESS, ET AL.,
Plaintiffs,
RONALD E. CHAMNESS and RHEA ANN CHAMNESS,

Plaintiffs-Appellants,

VERSUS

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for MBank Dallas, N.A.,
DEPOSIT INSURANCE BRIDGE BANK, N.A.,
OREGON, INC., WILLIAM R. TRIONE, and
ALINDA HILL WIKERT,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

(3:89-CV-1117-P)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Ronald Chamness and wife Rhea Chamness appeal summary judgment and dismissal of their suit against the Federal Deposit Insurance Corp. ("FDIC"), MBank Dallas, N.A. ("MBank"), Deposit Insurance Bridge Bank, N.A. ("Bridge Bank"), Oregon, Inc., William Trione and Linda Wikert. We affirm.

I.

A.

During 1979, Ronald Chamness and his late wife, Marlene Chamness, lived in, and claimed as their homestead, a house located at 6550 Cliffbrook in Dallas, Texas (the "Cliffbrook homestead"). In 1979, at a time when they still lived at the Cliffbrook homestead, they purchased a house located at 4208 Armstrong Parkway, Highland Park, Texas (the "Armstrong property"). They immediately began renovating the Armstrong property, during which time it was not occupied. Shortly thereafter, Marlene Chamness died.

In 1980, while still living in the Cliffbrook homestead, Ronald Chamness obtained a $1 million loan secured by a deed of trust covering the Armstrong property in order to renovate it. To obtain the loan, Chamness executed a home-

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should no t be published.

stead affidavit stating that the Armstrong property "does not constitute any part of [Chamness's] business or urban homestead, and the [Armstrong property] is not claimed . . . as homestead property." In 1981, Chamness sold the Cliffbrook homestead and thereafter claimed his Cedar Creek lake house in Henderson County, Texas, as his homestead.

Chamness borrowed an additional $1.5 million and $937,500 from Republic National Bank of Dallas to renovate the Armstrong property; both loans were secured by a deed of trust to the property. Chamness also signed two homestead affidavits and a subordination agreement.

The loans were moved to First City Bank of Dallas and eventually assigned to MBank in March 1985. Chamness signed an additional homestead affidavit disclaiming the Armstrong property as a homestead. He defaulted on the promissory note, and MBank requested Trione, the trustee of the deed of trust, to foreclose. After foreclosure, the Armstrong property then was sold to Oregon, Inc., which conveyed title to Wikert.

B.

In 1988, Chamness, his second wife, Rhea, and his children filed suit in state court against MBank, Oregon, Inc., Trione, and Wikert, claiming that Chamness was the fee simple owner of the Armstrong property and that it was his

homestead and therefore improperly subjected to foreclosure.[1] MBank filed a counterclaim against Ronald Chamness for common law fraud and for collection on the notes on the Armstrong property. In 1989, the suit was removed to federal court.

C.

During the course of the lawsuit, the plaintiffs objected to and/or failed to respond to several discovery requests after obtaining various extensions of time. In October 1989, the FDIC[2] filed its first motion to compel production of certain documents. In December 1989, the FDIC, Bank One, and Trione filed a motion for summary judgment.[3] After six motions for extensions by the plaintiffs, the FDIC filed a motion for sanctions pursuant to Fed. R. Civ. P. 37 based upon the plaintiffs' failure to produce documents. The plaintiffs failed to respond to this motion.

In June 1990, the FDIC filed a Fed. R. Civ. P. 16(f) motion for sanctions, seeking dismissal based upon the plaintiffs' failure to cooperate in the filing of a joint pretrial order. Because of confusion concerning the plaintiffs' legal representation, no response to the rule 16(f) motion was filed.

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[1] Rhea Chamness was included as a plaintiff because she claimed a marital interest in the property; Ronald Chamness's children claimed and interest in the property under their late mother's will.

[2] The FDIC became receiver of MBank in the spring of 1989.

[3] Because Bank One's counterclaim against Ronald Chamness was still pending, the motion was titled "Motion for Partial Summary Judgment."

In August 1990, the district court entered a memorandum opinion granting summary judgment, holding that the doctrine of D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942), and 12 U.S.C. § 1823(e) barred the plaintiffs' homestead claims. Since the plaintiffs had failed to respond to the summary judgment motion, the court accepted as true the defendants' factual allegations. The court also granted the FDIC's motion for sanctions, including dismissal of plaintiffs' claims. In April 1993, the court entered its final order of summary judgment and sanctions.

II.

A.

We review a grant of summary judgment de novo. Hanks v. Transcontinental Gas Pipe Line Corp., 953 F.2d 996, 997 (5th Cir. 1992). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). After a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue for trial. Hanks, 953 F.2d at 997.

The plaintiffs failed to respond to the summary judgment motion, despite repeated extensions of time. In such cases, we must assume as true the facts alleged by the moving party. Eversley v. MBank Dallas, 843 F.2d 172, 174 (5th Cir. 1980). Furthermore, we may affirm a grant of summary judgment on grounds other than those stated by the district court. Bernhardt v. Richardson-Merrell, Inc., 892 F.2d 440, 444 (5th Cir. 1990).

We agree with the district court that the homestead claims asserted by the plaintiffs were barred under Texas homestead law, which provides that a claimant has no homestead protection if he represents that the property is not his homestead at a time when he is not actually occupying the property. Even if a claimant intends to use the property as a homestead, he will be estopped by any disclaimers executed before actual use of that homestead. Miles Homes, Inc. v. Brubaker, 649 S.W.2d 791. 793 (Tex.App.—San Antonio 1983, writ ref'd n.r.e.). Accord Patterson v. FDIC, 918 F.2d 540, 547 (5th Cir. 1990).

B.

As we reasoned in a similar recent case, "[Because] Texas law bars the Plaintiff's defense to payment, we find that it is unnecessary to reach the question whether Plaintiff's defense to payment would be barred by D'Oench, Duhme or § 1823(e)." Wiltfang v. FDIC, No. 92-4811, 1993 U.S. App. LEXIS 23605 (5th Cir. Aug. 10, 1993) (per curiam)

(unpublished). We also need not consider whether the district court was correct in dismissing plaintiffs' claim as a sanction for discovery abuse. As we have explained, under Texas law the plaintiffs had absolutely no legitimate homestead claim. Accordingly, they are entitled to no recovery, and dismissed on that ground alone would have been appropriate.

The judgment is AFFIRMED.

App. B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1486

RONALD E. CHAMNESS, ET AL.,
Plaintiffs,
RONALD E. CHAMNESS and RHEA ANN CHAMNESS,
Plaintiffs-Appellants,

Versus

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for MBank Dallas, N.A., ET AL.
Defendants-Appellees.

Appeal from the United States District Court for the
Northern Disrict of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 11/17/93, 5 Cir., 1993, F.3d ( )

(January 4, 1994)
Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ _____
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND
LOCAL RULES 41
FOR STAY OF THE
MANDATE

App. C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RONALD E. CHAMNESS,
RHEA ANN CHAMNESS,
LISA C. CHAMNESS,
RONALD E. CHAMNESS, JR.
AND HOLLY A. CHAMNESS

Plaintiffs,

v. CIVIL ACTION NO. CA3-89-1117-P

FEDERAL DEPOSIT INSURANCE
CORPORATION, AS RECEIVER
FOR MBANK DALLAS, N.A.,
OREGON, INC., WILLIAM R.
TRIONE AND ALINDA HILL WIKERT

Defendants.

MOTION FOR PARTIAL SUMMARY JUDGMENT

FEDERAL DEPOSIT INSURANCE CORPORATION ("FDIC"), as Receiver for MBANK DALLAS, N.A., BANK ONE, TEXAS, N.A. ("BANK ONE") and WILLIAM R. TRIONE ("TRIONE") move this Court, pursuant to Fed. R. Civ. P. 56 for Partial Summary Judgment[1], and in support thereof would show the Court the following:

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[1] As there is pending a counterclaim by BANK ONE against Plaintiff Ronald E. Chamness, this is a Motion for Partial Summary Judgment as to all of PLAINTIFFS' claims against the moving parties, and would not dispose of BANK ONE's pending counterclaim.

I. INTRODUCTION.

1. On June 2, 1988, Plaintiffs Ronald E. Chamness, Rhea Ann Chamness, Lisa C. Chamness, Ronald E. Chamness, Jr., and Holly A. Chamness ("Plaintiffs") filed their Original Petition ("Petition") against MBank Dallas, N.A. ("MBank") in the 134th Judicial District Court, Dallas County, Texas, Cause No. 33-6940-G. MBank answered by filing a general denial on or about June 24, 1988.

2. On March 28, 1989, the Comptroller of the Currency declared MBank insolvent pursuant to 12 U.S.C. § 191 (1988). On that same date, the Federal Deposit Insurance Corporation ("FDIC") was appointed as receiver for MBank pursuant to 12 U.S.C. § 1821(c)(1988).

3. On April 27, 1989, the FDIC, in its capacity as Receiver of MBank, and Deposit Insurance Bridge Bank, N.A. ("DIBB") intervened as parties Defendant in the state court proceeding, and FDIC and DIBB removed this action to this Court pursuant to 12 U.S.C. §1819(Fourth) (1988).

4. Subsequent to the removal of the case to this Court, DIBB changed its name to Bank One.

5. FDIC's, Bank One's, and Trione's Motion for Summary Judgment embraces Plaintiffs' entire claims against FDIC, Bank One, and Trione, as set forth in the Petition. The pleadings and affidavits on file herein establish that no genuine issue exists as to any material fact necessary to defeat Plaintiffs' claims, and that FDIC, Bank One, and Trione are entitled to judgment as a matter of law.

6. In the alternative, if judgment is not rendered upon all of Plaintiffs' claims and a trial is necessary, FDIC, Bank One, and Trione request the Court to make an Order specifying the facts not substantially controverted, pursuant to Fed. R. Civ. P. 56(d).

II. UNDISPUTED FACTS UPON WHICH MOTION FOR PARTIAL SUMMARY JUDGMENT IS BASED.

7. In support of their Motion for Partial Summary Judgment, FDIC, Bank One, and Trione refer this Court to the pleadings, the Affidavit of C.C. Prudhomme, III, together with the exhibits attached thereto, the Affidavits of A. Burch Waldron, III, together with the exhibits attached thereto, and the accompanying Brief in Support of Motion for Partial Summary Judgment. In particular, FDIC, Bank One, and Trione direct this Court's attention to the following summary judgment evidence which demonstrates that no genuine issue exists as to any material fact and FDIC, Bank One, and Trione are entitled to judgment as a matter of law.

8. On June 11, 1980, Ronald E. Chamness ("Chamness") and the Estate of Marlene Chamness ("Chamness Estate") executed a Homestead Affidavit stating, inter alia, that the real property in Highland Park, Dallas County, Texas, commonly known as 4208 Armstrong Parkway (the "Armstrong Property"), "does not constitute any part of [Chamness'] business or urban homestead, and the [Armstrong Property] is not claimed or designated by him as homestead property."

(Prudhomme Aff. at ¶3 with attached Exhibit "A"). (Waldron Aff. at ¶2 authenticating Plaintiffs' Responses to MBank's First Requests for Admission ("Requests for Admission") Nos. 18 and 19 referencing Exhibit 12). On January 9, 1981, Chamness executed a Subordination Agreement stating, inter alia, at paragraph 2, that the Armstrong Property was not his homestead. (Waldron Aff. at ¶2 authenticating Answers to Requests for Admission Nos. 34, 35 and 36 referencing Exhibit 112). The statements made in the above referenced Subordination Agreement were made in connection with a $1.5 million deed of trust and note in favor of RepublicBank. (Waldron Aff. at ¶2 authenticating Answers to Requests for Admission Nos. 29, 30, 31, 32 and 33 referencing Exhibits 16 and 16A).

9. On June 3, 1981, Chamness executed a Non Homestead Affidavit stating, inter alia, that the Armstrong Property was not his business or residence homestead, and that he renounced and disclaimed any homestead right, interest, or exemption in such property. (Prudhomme Aff. at 4 with attached Exhibit "B"). (Waldron Aff. at 2 authenticating Answers to Requests for Admission Nos. 37 and 38 referencing Exhibit 23). The above referenced Non- Homestead affidavit was executed in connection with a $937,500.00 note from RepublicBank secured by a modification of the RepublicBank Deed of Trust referenced in the above paragraph. (Waldron Aff. at ¶2 authenticating Answers to

Requests for Admission Nos. 40, 41 and 42 referencing Exhibit 25 thereto, and Answers to FDIC's First Requests for Admission Nos. 1 and 2 referencing Exhibit No. 1 thereto).

10. On June 21, 1983, Chamness executed and delivered to First City Bank of Dallas a Deed of Trust Note (the "Note") in the original principal sum of $2,550,000.00. Bank One is now the owner and holder of the Note. As security for the Note, Chamness executed on June 28, 1983 a Deed of Trust Security Agreement and Assignment of Rents ("June 21, 1983 Deed of Trust") covering the Armstrong Property. Chamness represented in the June 21, 1983 Deed of Trust that the Armstrong Property was not and had not constituted his homestead, and as security for the Note, was subject to foreclosure under the terms of the June 21, 1983 Deed of Trust should Chamness default on the Note. (Prudhomme Aff. at ¶5 with attached Exhibit "C"). (Waldron Aff. at ¶2 authenticating Answers to Requests for Admission Nos. 50, 51, 66 and 67 referencing Exhibits 38 and 42 thereto). The funds advanced by First City Bank of Dallas paid off the amounts owing under the RepublicBank notes and deeds of trust referenced in paragraphs 8 and 9 above. (Waldron Aff. at ¶2 authenticating Answers to Requests for Admission Nos. 137 and 138).

11. On June 21, 1983, Chamness executed an Affidavit, where he stated, inter alia that the Armstrong Property was not his homestead. (Prudhomme Aff. at ¶6 with attached

Exhibit "D"). (Waldron Aff. at ¶2 authenticating Answers to Requests for Admission Nos. 52 and 53 referencing Exhibit 39).

12. On or about March 8, 1985, First City Bank of Dallas assigned the note and deed of trust referenced in paragraph 10 above to MBank. This is one of the two Deeds of Trust challenged in Plaintiffs' suit. (Waldron Aff. at ¶3 referencing the certified copy of the Assignment, Exhibit "B" thereto).

13. On or about March 7, 1984, Chamness and his wife, Rhea Ann Chamness, executed another Deed of Trust, Security Agreement and Assignment of Rents ("March 7, 1984 Deed of Trust") which specifically states on Exhibit "C" that "[Chamness] expressly represents that none of the [Armstrong Property] is claimed by [Chamness] as homestead and [Chamness] renounces all and every claim that any portion of the [Armstrong Property] is used or claimed by [Chamness] as exempt from forced sale under the laws of the State of Texas." This is the second of the two Deeds of Trust challenged in Plaintiffs' suit. (Prudhomme Aff. at ¶7 with attached Exhibit "E"). (Waldron Aff. at ¶2 authenticating Answers to Requests for Admission Nos. 79 and 80 referencing Exhibit 49 thereto). Such Deed of Trust is secured by a note in the amount of $7.5 million. (Waldron Aff. at ¶2 authenticating Answers to Requests for Admission Nos. 82, 83 and 84 referencing Exhibit 115).

14. There is no documentation in the official bank records of either Bank One and/or MBank regarding any

written document or other agreement between MBank and Plaintiffs which show that the Armstrong Property was Chamness' homestead. On the contrary, all of the records affirmatively show that the Armstrong Property was not Chamness' homestead. (Prudhomme Aff. at ¶8).

III. ISSUES OF LAW TO BE DETERMINED.

15. The following are the only issues that need to be determined with respect to granting FDIC's, Bank One's and Trione's Motion for Partial Summary Judgment. Each of these issues will be shown to require a negative answer on the basis of the evidence and the applicable substantive law as set forth in the accompanying Brief in Support of Motion for Partial Summary Judgment:

(a) Whether Plaintiffs are entitled to assert home stead defenses to lien claims in spite of written representations that the property at issue was not homestead and which are based upon alleged oral agreements, misrepresentations and courses of conduct of the failed MBank, all of which are not recorded in the official bank records?

(b) Whether Plaintiffs are entitled to recover exemplary damages, prejudgment interest, or attorneys' fees?; and

(c) Whether Plaintiffs are entitled to recover against Trione where Plaintiffs have not alleged that Trione acted outside the scope of his authority as an officer of MBank?

IV. CONCLUSION.

WHEREFORE, FDIC, Bank One and Trione request:

(1) That Judgment be accordingly entered in favor of FDIC, Bank One and Trione against Plaintiffs and that Plaintiffs take nothing from the FDIC, Bank One and Trione by way of their action herein;

(2) In the alternative, that the Court enter partial Summary Judgment on such issues as the Court finds are not substantially controverted, pursuant to Fed. R. Civ. P. 56(d); and

(3) That this Court grant FDIC, Bank One and Trione such other and further relief to which FDIC, Bank One and Trione may show themselves justly entitled.

Respectfully submitted,

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/s/ By: _____
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and

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ATTORNEYS FOR FEDERAL DEPOSIT INSURANCE CORPORATION, N.A. AS RECEIVER FOR MBANK DALLAS, N.A., BANK ONE TEXAS, N.A., AND WILLIAM R. TRIONE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing Motion for Partial Summary Judgment has been served by certified mail, return receipt requested to the following attorneys of record on this 1st day of December, 1989:

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/s/_____
A. BURCH WALDRON, III

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RONALD E. CHAMNESS, RHEA ANN CHAMNESS, LISA C. CHAMNESS, RONALD E. CHAMNESS, JR. AND HOLLY A. CHAMNESS

Plaintiffs,

v. CIVIL ACTION NO. CA3-89-1117-P

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK DALLAS, N.A., OREGON, INC., WILLIAM R. TRIONE AND ALINDA HILL WIKERT

Defendants.

MEMORANDUM OPINION AND ORDER

CAME ON the Court this day to consider: (1) the Motion for Partial Summary Judgment submitted by Defendants FDIC as Receiver for MBank Dallas, Bank One Texas, and William R. Trione, which Motion was filed on 12/6/89, to which there is no timely response; (2) the Plaintiffs' Objections to the Affidavits of Waldron and Prudhomme in support of their motion for summary judgment, which objection was filed on 4/9/90, and the FDIC's Objection thereto of 5/7/90; (3) the FDIC's Motion for Sanctions filed 6/18/90, to which Plaintiffs have not responded; (4) the FDIC's Rule 16(f)

Motion for Sanctions filed 6/26/90, to which the Plaintiffs have not responded; (5) Defendant Wikert's Rule 16(f) Motion for Sanctions, to which Plaintiffs have not responded; and (6) Defendant Wikert's Motion for Sanctions filed 6/25/90, to which the Plaintiffs have not filed a response.

I. The Motion for Partial Summary Judgment

A. Standards for summary judgment

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). Rule 56(c) mandates summary judgment in any case where a party fails to establish the existence of an element essential to his case and on which he bears the burden of proof, and renders all other facts immaterial because there is no longer a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 91 L.Ed.2d 265, 273 (1986).

When a defendant fails to respond to a motion for summary judgment, the court may not simply grant a "default" summary judgment. Hebernia National Bank v. Admistricion Central Sociedad Anonima, 776 F.2d 1277, 1279 (5th Cir. 1985). The district court may, however, accept as undisputed the facts listed in support of the movant's summary judgment motion and grant the motion where the movant has made a prima facie showing of its entitlement to summary judgment. Eversley v. MBank Dallas, 843 F.2d 172, 174 (5th Cir. 1988).

When a defendant fails to bring forward specific facts demonstrating a genuine issue for trial, summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. 317, 91 L.Ed.2d 265, 273 (1986).

B. Factual background

This action was originally filed by the Plaintiffs in state court against defendant MBank Dallas. On 3/28/89 MBank was declared insolvent and the FDIC was appointed as the Receiver for MBank. Subsequently, the FDIC as Receiver, the FDIC, and the Deposit Insurance Bridge Bank ("DIBB") intervened as parties defendants and this case was removed to this Court pursuant to 12 U.S.C. §1819(Fourth).

The Court accepts as undisputed the following facts:

(1) On 6/11/80, Ronald E. Chamness ("Chamness") and the Estate of A. Marlene Chamness ("Chamness Estate") executed a Homestead Affidavit stating, inter alia, that the real property in Highland Park, Dallas County, Texas, commonly known as 4208 Armstrong Parkway (the "Armstrong Property"), "does not constitute any part of [Chamness'] business or urban homestead, and the [Armstrong Property] is not claimed or designated by him as homestead property." (Prudhomme Aff. at ¶3 with attached Exhibit "A").[2]

(2) On 6/3/81, Chamness executed a Non-Homestead Affidavit stating, inter alia, that the Armstrong Property was not his business or residence homestead, and that he renounced any homestead right, interest, or exemption in

[2] See also Waldron Affidavit Exhibit A, Requests for Admission Nos. 18-19 and Exhibit 12 to said Requests, in which Chamness admits the correctness and accuracy of the aforementioned document and to genuineness of his signature thereon.

such property. (Prudhomme Aff. at ¶4 with attached Exhibit "B").[3]

(3) On 6/21/83, Chamness executed and delivered to First City Bank of Dallas a Deed of Trust Note (the "Note") in the original principal sum of $2,550,000.00. Bank One is now the owner and holder of the Note. As security for the Note, Chamness executed on June 28, 1983 a Deed of Trust Security Agreement and Assignment of Rents ("June 21, 1983 Deed of Trust") covering the Armstrong Property. Chamness represented in the June 21, 1983 Deed of Trust that the Armstrong Property was not and had not constituted his homestead, and as security for the Note, was subject to foreclosure under the terms of the June 21, 1983 Deed of Trust should Chamness default on the Note. (Prudhomme Aff. at ¶5 with attached Exhibit "C").[4]

(4) On or about 6/21/83, Chamness executed an Affidavit, where he stated, inter alia that the Armstrong Property was not his homestead. (Prudhomme Aff. at ¶6 with attached Exhibit "D").[5]

(5) On or about 3/7/84, Chamness executed another Deed of Trust, Security Agreement and Assignment of Rents ("March 7, 1984 Deed of Trust") which specifically states on Exhibit "C" thereto that "[Chamness] expressly represents that none of the [Armstrong Property] is claimed by [Chamness] as homestead and [Chamness] renounces all and every claim that any portion of the [Armstrong Property] is

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[3] See also Waldron Affidavit Exhibit A, Requests for Admission Nos. 37-38 and Exhibit 23 to said Requests, in which Chamness admits the correctness and accuracy of the aforementioned document and to genuineness of his signature thereon.

[4] See also Waldron Affidavit Exhibit A, Requests for Admission Nos. 50-51 and Exhibit 38 to said Requests, in which Chamness admits the correctness and accuracy of the aforementioned document and to genuineness of his signature thereon.

[5] See also Waldron Affidavit Exhibit A, Requests for Admission Nos. 52-53 and Exhibit 39 to said Requests, in which Chamness admits the correctness and accuracy of the aforementioned document and to genuineness of his signature thereon.

used or claimed by [Chamness] as exempt from forced sale under the laws of the State of Texas." This is the second of the two Deeds of Trust challenged in Plaintiffs' suit. (Prudhomme Aff. at ¶7 with attached Exhibit "E").[6]

C. Plaintiffs' factual allegations and claims

Plaintiffs' claims are based upon the following factual allegations:

(1) that Ronald E. Chamness was the fee simple owner of the Armstrong Property. (Petition ¶ 3).

(2) that the Plaintiffs used the property as a homestead at all relevant times. (Petition ¶ 3).

(3) that at all pertinent times, the Armstrong Property was encumbered by certain deeds of trust in favor of MBank, and that none of the loans evidenced by the notes issued in conjunction with and secured by said deeds of trust provided any of the funds for purchase of the homestead property. (Petition ¶ 4).

(4) that MBank, as owner or assignee of the deeds of trust, posted the Armstrong Property for foreclosure and sold it on 6/3/86. (Petition ¶ 5).

(5) that MBank knew or should have known that the Armstrong Property was Plaintiffs' homestead and that the Property was either exempt or partially exempt from foreclosure. (Petition ¶7).

(6) that MBank induced Plaintiffs not to contest the foreclosure by failing to disclose to Plaintiffs that the Armstrong Property was Plaintiffs' homestead. (Petition ¶ 15).

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[6] See also Waldron Affidavit Exhibit A, Requests for Admission Nos. 79-80 and Exhibit 49 to said Requests, in which Chamness admits the correctness and accuracy of the aforementioned document and to genuineness of his signature thereon.

(7) that Plaintiffs in fact failed to contest the fore closure because of MBank's alleged nondisclosure. (Petition ¶ 15).

As relief, Plaintiffs' seeks to: (1) set aside the foreclosure sale of the Armstrong Property; (2) recover allegedly exempt property and money received by MBank from the foreclosure sale; (3) recover damages for the alleged wrongful foreclosure by MBank; (4) recover damages for MBank's alleged failure to disclose to Plaintiffs their alleged homestead right, thus fraudulently inducing them not to contest the foreclosure; and (5) recover attorneys' fees.

D. Governing law

(1) Defendant FDIC

In D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942), the Supreme Court first enunciated the rule that a person dealing with an FDIC-insured institution may not assert a claim or defense against the FDIC which is based upon a secret side agreement he had with the bank because he has, no matter how innocently, lent himself to a scheme which would deceive the banking authorities. If the agreement is not properly documented in the bank's files, it is "secret" as to the FDIC. Id. at 461. Recognizing the importance of the policy underlying D'Oench, Duhme, Congress enacted 12 U.S.C. §1823(e) which, prior to 8/9/89, read as follows:

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either

> as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.[7]

In Langley v. FDIC, 484 U.S. 86, 93, 98 L.Ed.2d 340, 348 (1987), the Supreme Court expounded on the policy and reasoning underlying D'Oench when it held that

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[7] Section 217 of FIRREA, effective August 9, 1989, reenacted substantially the former provision, setting its provisions out in paragraph rather than clause form, making tense changes, and adding FDIC as Receiver. Section 1823(e) now reads as follows:

> **Agreements against interests of Corporation**
>
> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement--
>
> (1) is in writing,
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemoporaneously with the acquistion of the asset by the depository institution,
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board of committee, and
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

> [O]ne who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme or arrangement that is likely to mislead the banking authorities, whether the condition consists of performance of a counterpromise (as in D'Oench, Duhme) or of the truthfulness of a warranted fact.

With regard to the Plaintiffs' claim of fraud in the inducement, the Langley Court held "that neither fraud in the inducement nor knowledge by the FDIC is relevant to [§ 1823(e)]'s application." Id. The Court reasoned as follows:

> While the borrower who has relied on an erroneous or even fraudulent unrecorded representation has some claim to consideration, so do those who are harmed by his failure to protect himself by assuring that his agreement is approved and recorded in accordance with the statute. ...
>
> The short of the matter is that Congress opted for the certainty of the requirements set forth in § 1823(e). An agreement that meets them prevails even if the FDIC did not know of it; and an agreement that does not meet them fails even if the FDIC knew. It would be rewriting the statute to hold otherwise.

Langley, 484 U.S. at 94-95, 98 L.Ed.2d at 349. Thus, it is irrelevant that the borrower did not knowingly participate in the fraud, and it is also irrelevant that the borrower may not have actually had dealings with the failed bank. Chatham Ventures, Inc. v. FDIC, 651 F.2d 355 (5th Cir. 1981), cert. denied, 456 U.S. 972 (1982).

Furthermore, the rationale and policy behind D'Oench,

Duhme and 1823(e) applies to affirmative claims for relief against the FDIC as well as to affirmative defenses, because if an obligor as plaintiff or counter-plaintiff asserted "oral side agreements reducing the value of assets formerly held by the bank, then the FDIC would be misled." Beighley v. FDIC, 868 F.2d 776, 784 (5th Cir. 1989).

In addition, "the D'Oench, Duhme doctrine also bars the assertion of affirmative claims for relief against the FDIC and its successor for alleged wrongful conduct by the filed bank." RSR Properties, Inc. v. FDIC, 706 F.Supp. 524, 531 (W.D. Tex 1989). Accord, First National Bank v. FDIC, 707 F.Supp. 265, 271 n.12 (W.D. Tex. 1989) ("the public policy interests stated in D'Oench, Duhme ... have been extended to shield the FDIC from liability for the misconduct of failed banks.").

Lastly, it is implicit in Plaintiffs' claims for relief that the purported status of the Armstrong Property as their homestead would serve to supersede any other laws affecting the property. In this regard, the Court notes that in Templin v. Weisgram, 867 F.2d 240 (5th Cir.), cert. denied, 110 S.Ct. 63 (1989), the Court held that D'Oench, Duhme and § 1823(e) barred the borrower from asserting that a facially valid deed of trust, deed, and note were not enforceable. Thus, Templin specifically established that the federal protections of the FDIC overrides the homestead protection generally afforded by the Texas Constitution.

(2) Defendants Deposit Insurance Bridge Bank and Bank One

In RSR Properties, Inc. v. FDIC, 706 F.Supp. 524, 531 (W.D. Tex. 1989), the court held that

> [T]he implication of D'Oench, Duhme is that those affirmative defenses and counterclaims which are deemed barred as to the FDIC are equally barred as to NCNB, an entity taking the instrument from the and under the management of the FDIC. FSLIC v. Murray, 853 F.2d 1251 (5th Cir. 1988) and cases cited therein; also FDIC v. Cremona Co., 832 F.2d 959, 964 (6th Cir. 1987), cert. dismissed sub. nom. Gonda v. FDIC, 108 S.Ct. 1494, 99 L.Ed.2d 879 (1988).

In addition, § 214 of FIRREA, codified at 12 U.S.C. § 1821(n)(4)(I) states, in pertinent part, that

> [N]o agreement which tends to diminish or defeat the right, title or interest of a bridge bank in any asset of an insured bank in default acquired by it shall be valid against the bridge bank unless such agreement—
>
> (i) is in writing,
> (ii) was executed by such insured bank in default and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the insured bank in default,
> (iii) was approved by the board of directors of such insured bank in default or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
> (iv) has been, continuously, from time of its execution, an official record of such insured bank in default.

It is asserted that Bank One was a bridge bank created by the FDIC to acquire a portion of the assets and assume certain liabilities of the former MBank institutions. Accordingly, pursuant to the authorities, any of the Plaintiffs' claims which are barred as to the FDIC should likewise be barred as against Bank One and the Deposit Insurance Bridge Bank.

(3) Defendant William R. Trione

Defendant Trione was, at all material time herein, a vice-president of the failed MBank. The petition makes no allegation that any of Trione's actions or representations were undertaken outside the scope of his employment as an officer of MBank.

As set forth in Whitehead v. FDIC, slip. op. CA3-89-0973-T (N.D.Tex. 9/13/89, Maloney, J.):

> Plaintiff has failed to allege that Defendant ... acted in any capacity other than as officers within their scope of employment with MBank. Therefore, this Court finds, in accordance with D'Oench and RSR Properties that Plaintiff has failed to state a cause of action against Defendants.

The Court agrees with the above opinion. Accordingly, summary judgment in favor of Defendant Trione is appropriate for failure to state a claim.

E. Application

Based upon all of the above, when the law is applied to the facts as alleged by the Plaintiffs and to the facts as found herein by the Court, summary judgment should be and is hereby

GRANTED with respect to all of Plaintiffs' claims as to Defendants FDIC, Bank One Texas, Deposit Insurance Bridge Bank, and William R. Trione. It is the Court's finding that it was Chamness who executed the deeds of trust, affidavits, and non-homestead affidavits set forth above in part I(B) hereinabove, and that those instruments and all other applicable loan documents are facially valid. It is the Court's opinion that D'Oench, Duhme, § 1823(e) and other law overrides the homestead protection upon which Plaintiffs base their claims, and that all of Plaintiffs' claims for are barred by the foregoing authorities.

Inasmuch as the Court has found that foreclosure and the actions of the Defendants were not wrongful, it follows that Plaintiffs' claims for attorneys' fees, prejudgment interest and exemplary damages should likewise be dismissed as to all Defendants.

II. Plaintiffs' Objections to the Affidavits of Waldron and Prudhomme

After review of the subject Affidavits and the circumstances set forth by the FDIC in its 5/7/90 response, the Court is of the opinion that the Plaintiffs' Objections should be DENIED on the merits. Alternatively, the Court would grant the FDIC's objection of 5/7/90 and deem the Plaintiffs' untimely objections to be stricken from the record.

III. The Motions for Sanctions

The Court has reviewed the motions for sanctions filed by various parties against the Defendants in this matter.

After review, it is the Court's opinion that the Plaintiffs have repeatedly engaged in willful and bad faith conduct: (1) in refusing to adhere to the various deadlines ordered herein, including the submission of a joint pretrial order, and (2) in failing to produce documents responsive to the FDIC's First Request for Production in the time and manner as provided by the Federal Rules, and in direct contravention of the order entered herein by U.S. Magistrate Tolle on 3/12/90.

Accordingly, the Court is of the opinion that the Motions for Sanctions should be GRANTED, and that the Plaintiffs' claims against all Defendants should be dismissed with prejudice.

The Court is also of the opinion that attorneys fees should awarded to the various parties defendants. The court will decide the award of attorneys fees from affidavits. As required by Nisby v. Commissioners Court of Jefferson County, 798 F.2d 134, 137 (5th cir. 1986), each defendant's affidavits shall be in the form necessary to enable the court to made the required Johnson analysis, and shall be filed within 20 days of the date of this Order. See Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974) and Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575, 581 (5th Cir. 1980). The details for those attorneys' fees incurred by any defendant for work performed by its attorneys germane to any counterclaim on its behalf herein, however, shall be clearly set forth and designated as such. Any responsive

memorandum and affidavit(s) are to be filed in accordance with Local Rule 5.1(e).

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that the Motion for Partial Summary Judgment is GRANTED, and that Plaintiffs Ronald E. Chamness, Rhea Ann Chamness, Lisa C. Chamness, Ronald E. Chamness, Jr., and Holly A. Chamness take nothing from Defendants FDIC, Bank One and William R. Trione by way of Plaintiffs' action herein. It is further

ORDERED that Plaintiffs' claims as against all defendants herein are dismissed with prejudice, and that Plaintiffs take nothing from Defendant Alinda Hill Wikert. It is further

ORDERED that Plaintiffs shall pay defendants' attorneys' fees in amounts to be determined via affidavits as set forth above. It is further

ORDERED that all costs of court incurred herein shall be taxed against Plaintiffs.

SO ORDERED this 24th day of August, 1990.

/s/ _____
ROBERT W. PORTER
UNITED STATES DISTRICT JUDGE

App. E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RONALD E. CHAMNESS, RHEA ANN CHAMNESS, LISA C. CHAMNESS, RONALD E. CHAMNESS, JR. AND HOLLY A. CHAMNESS

Plaintiffs,

v. CIVIL ACTION NO. CA3-89-1117-P

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK DALLAS, N.A., OREGON, INC., WILLIAM R. TRIONE AND ALINDA HILL WIKERT

Defendants.

FINAL JUDGMENT

This action came before the Court on Ronald E. and Rhea Ann Chamness ("Plaintiffs") Motion to Reconsider and Vacate Memorandum Opinion dated August 24, 1990. The issues having been duly considered and a decision having been rendered, pursuant to the Court's Order dated April 29, 1993, it is ORDERED and ADJUDGED that Plaintiffs' Motion to Reconsider and Vacate Memorandum Opinion is hereby DENIED.

IT IS FURTHER ORDERED and ADJUDGED that Plaintiffs take nothing by this suit, and that Judgment be, and

it is hereby, entered against Plaintiffs in all things, and in favor of Defendants Federal Deposit Insurance Corporation as Receiver for MBank Dallas, N.A., Bank One, Oregon, Inc., and William R. Trione; and

IT IS FURTHER ORDERED and ADJUDGED that the above-styled and numbered cause be, and it is hereby, DISMISSED with all costs taxed by the Clerk of Court against Plaintiffs.

SO ORDERED.

SIGNED this 29th day of April, 1993.

/s/ _____
JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE